90-1690

Supreme Court, U.S.
FILED
MAY 2 1991
OFFICE OF THE CLERK

NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

OLIVER BOND AND HERTA BOND

Petitioners

VS:

OCTAGON PROCESS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

E. FREEMAN LEVERETT
COUNSEL OF RECORD FOR
PETITIONERS
HEARD, LEVERETT & PHELPS, P.C.
25 S. THOMAS STREET
P. O. DRAWER 399
ELBERTON, GEORGIA 30635
TEL: 404/283-2651

QUESTIONS FOR REVIEW

(1) Did The Court of Appeals err in holding that the stream of commerce theory of *in personam* jurisdiction as applied to a manufacturer of a product, first definitively stated in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 490 (1980), had been rejected in *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed.2d 490 (1980), and *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987)? Three other Courts of Appeal have previously held to the contrary.

(2) Did the Court of Appeals err in upholding the dismissal of petitioners' complaint under Rule 12(b)(2), FRCP, rather than directing transfer to the proper district court in New

Jersey pursuant to 28 USC 1406(a) and this Court's decision in Goldlawr v. Heiman, 369 U.S. 463, 466, 82 S. Ct. 913, 8 L.Ed.2d 39 (1962)?

PARTIES TO THE PROCEEDING

All parties to the proceedings in the District Court and Court of Appeals below appear in the caption. Petitioners are not aware that any parent or subsidiary companies of Respondent exist.

TABLE OF CONTENTS

	PAGE NO.
QUESTIONS FOR REVIEW.....	i
PARTIES TO THE PROCEEDINGS.....	iii
TABLE OF AUTHORITIES.....	v
REPORTS OF OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE WRIT.....	6
CONCLUSION.....	28
CERTIFICATE OF SERVICE.....	29

TABLE OF AUTHORITIES

CASES	PAGE NO.
A.I.M. International, Inc. v. Battenfeld Extrusion Systems, Inc., 116 F.R.D. 633, 641 (D.C. Ga. 1987).....	15
American Greetings Corp. v. Cohn, 839 F2d 1164, 1167 (6th Cir. 1988).....	21
Andel v. Getz Services, 197 Ga. App. 653, 399 SE2d 226 (1990).....	24
Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).....	i, 7, 10 12, 14, 15, 17
Bean Dredging Corp. v. Dredge Technology Corp., 744 F2d 1081 (5th Cir. 1984).....	12, 18, 21
Becker v. Commissioner of Internal Revenue, 852 F2d 524 (11th Cir. 1988).....	27
Bentz v. Recile, 178 F2d 1026 (5th Cir. 1985).....	26
Bond v. Octagon Process, Inc., 745 F. Supp. 710 (D.C. Ga. 1990).....	1
Boyle v. United Technologies Corp., 487 U.S. 500, 108 S. Ct. 2510, 101 L.Ed.2d 442 (1988).....	4

Burton v. Subaru of America, Inc., 646 F. Supp. 78 (D.C. Ga. 1986)..... 20

Corke v. Sameit M.S. Song of Norway, 572 F2d 77 (2nd Cir. 1978)..... 26

DeJames v. Magnificience Carriers, Inc., 654 F2d 280 (3rd Cir. 1981), cert. den. 454 U.S. 1085 (1981)..... 18

Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F2d 26 (1st Cir. (1988).. 18

Dubin v. U.S., 380 F2d 813 (5th Cir. 1967)..... 26

Goldlawr v. Heiman, 369 U.S. 463, 466, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962)..... ii, 21, 22, 27

Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 490 (1980)..... i, 7, 18

Gulf Consolidated Services v. Corinth Pipeworkers,S.A., 898 F2d 1071 (5th Cir. 1990). 17

Haley v. Wright Mfg. Co., 651 F. Supp. 116 (D.C. La. 1986). 19

Hall v. Zambelli, 669 F. Supp. 753 (D.C. W.Va. 1987)..... 19

Hapaniewski v. City of Chicago Heights, 883 F2d 576 (7th Cir. 1989)..... 26

In re Agent Orange Litigation, 818 F2d 135 (2nd Cir. 1987).. 18

Interfirst Bank Clifton v. Fernandez, 844 F2d 279, 282 (5th Cir. 1988)..... 21

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)..... 12

Irving v. Owens-Corning Fiberglas Corp., 864 F2d 383 (5th Cir. 1989)..... 17, 20, 21

Ladwig v. Trust Ins. Exchange, 498 F. Supp. 161 (D.C. Wis. 1980)..... 26

Mason v. F. Lli Luigi & Franco Dal Maschio, 832 F2d 383 (7th Cir. 1987)..... 17

Mayo Clinic v. Kaiser, 383 F2d 653, 655 (8th Cir. 1967)..... 26

McDaniel v. Johns-Manville Sales Corp., 487 F. Supp. 714 (D.C. Ill. 1978)..... 19

Morris v. SSE, Inc., 843 F2d 489 (11th Cir. 1988)..... 15, 21

National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305 (D.C. Ga. 1980). 20

Nelson v. Park Industries, Inc., 717 F2d 1120, 1125-26 (7th Cir. 1983), cert. den. 465 U.S. 1024 (1984)..... 11

Omstead v. Brader Heaters, Inc., 5 Wash. App. 258, 487 P2d 234, 240 (1971)..... 18

Oswalt v. Scripto, 616 F2d 191 (5th Cir. 1980)..... 18

Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 343 F2d 905 (8th Cir. 1965)..... 27

Payne v. Kristofferson, 631 F. Supp. 39 (D.C. Ga.. 1985). 19

Pfiffer v. International Academy, 521 F. Supp. 1331 (D.C. Mo. 1981)..... 19

Porter v. Groat, 840 F2d 255, 258 (4th Cir. 1988)..... 26

Ross v. Colorado Outward Bound School, Inc., 603 F. Supp. 306 (D.C. N.Y. 1985)... 26

Rowe v. Dorrough, 150 Cal. App. 3rd 901, 198 Cal. Rptr. 131 (1984)..... 20

Scott v. Crescent Tool Co., 296 F. Supp. 147 (D.C. Ga. 1968)..... 19

Sells v. International Harvester Co., 513 F2d 762 (5th Cir. 1975) reh. den. 522 F2d 1280)..... 18

Sinatra v. National Enquirer, Inc., 854 F2d 1191 (9th Cir. 1988)..... 21

Stoehr v. American Honda Motor Co., 429 F. Supp. 763 (D.C. Neb. 1977)..... 19

Tedford v. Grumman American Aviation Corp., 488 F. Supp. 144 (D.C. Miss. 1980)..... 19

Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476 (D.C. Ga. 1975).... 20

Tillary v. Idaho Power Co., 425 F. Supp. 376 (D.C. Wash. 1976)..... 26

Value Engineering Co. v. Gisell, 140 Ga. App. 44, 230 S.E. 2d 29 (1976)..... 20

Westphal v. Mace, 660 F. Supp. 10 (D.C. Ariz. 1987)..... 26

World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)..... i, 7, 9 11

STATUTES

Rule 12(b)(2), FRCP..... i

28 USC 1254..... 1

28 USC 1406(a)..... ii, 2, 22, 27

O.C.G.A. §9-2-61..... 25

Constitution of Georgia, 1983, Art. VI, Sec. I, Par. VIII..... 25

MISCELLANEOUS

63 Am. Jur. 2d 1286, §893..... 20

Maltz, "Unraveling The Conundrum of the Law of Personal Jurisdiction: A Comment On Asahi Metal Industry Co. v. Superior Court of California", 1987 Duke L.J. 669, 671 (1987).... 11, 14

Murphy, "Personal Jurisdiction And The Stream Of Commerce Theory: A Reappraisal And A Revised Approach." 77 Ky. L.J. 248 (1988-89)..... 9, 11, 15

Note, "Personal Jurisdiction: The Evolution of the Minimum Contacts Analysis", 20 U. West. L.A. L.R. 219, 248 (1988-89).. 11

Note, "Personal Jurisdiction After Asahi: The Other International Shoe Drops", 55 Tenn. L.R. 41, 92 (1987).. 11

Note, "Jurisdiction, Fair Play and Foreign Defendants: Asahi Metal Industry Co. v. Superior Court", 61 St. John L.R. 629, 630 (1987)..... 11

The Supreme Court, 1986 Term, 101 Harv. L.R. 260, 265 (1987)..... 15

Van der Creek, "Jurisdiction Over The Person - The Progeny of Pennoyer And The Future of Asahi", 13 Nova L.R. 1267, 1309 (1989)..... 11

4 Wright & Miller, Federal Practice and Procedure, §1069, at pp. 391-392..... 20, 25

REPORTS OF OPINIONS BELOW

The opinion of the District Court is reported as Bond v. Octagon Process, Inc., 745 F. Supp. 710 (D.C. Ga. 1990). The per curiam affirmance of the Court of Appeals is not reported yet.

JURISDICTION

The decision and judgment of the Court of Appeals sought to be reviewed were entered March 28, 1991. Motion for rehearing was not filed from the per curiam affirmance. This Court has jurisdiction of the petition under 28 USC 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

". . .[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . ."

(2) 28 USC 1406:

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought. * * *"

STATEMENT OF THE CASE

Sgt. Oliver Bond was on active duty at the Elberton, Georgia, National Guard Armory on December 5, 1982, using a cleaning solvent supplied by the Department of Defense and manufactured by

respondent Octagon Process, Inc. of Edgewater, New Jersey. It was 21°F most of the day, and the combination of the cold temperature and the defatting and evaporative cooling of the solvent caused his hands to contract a disabling condition known as Raynaud's phenomenon, which has resulted in the fingers, particularly on the left hand, to "rot off". He has now been recognized as being totally disabled by the Veterans Administration. Due to initial confusion as to the nature of his condition,[1] this

---

1. A civilian physician initially diagnosed the condition as Buerger's disease, attributed to smoking. This resulted in Sgt. Bond's being denied any medical or other benefits for almost 4 years. In late 1985, doctors at Eisenhower Army hospital reviewed his case and concluded that the condition was in fact, service-related, diagnosed as acquired acrosteolysis, secondary to exposure to chemical solvents and cold environment. This was later changed to Raynaud's phenomenon.

diversity of citizenship civil action was not filed until May 7, 1987. Defendant Octagon filed Motion to Dismiss, based on a challenge to jurisdiction over the person of Octagon by the federal district court in Georgia, and the governmental contractor immunity doctrine later addressed in this Court's decision in Boyle v. United Technologies Corp., 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988).

With respect to the challenge to jurisdiction over the person of defendant, the evidence showed that defendant manufactured all of its products in New Jersey primarily for sale to the United States, and as to the solvent in question, all of its production was for the Defense Logistics Agency of the Department of Defense. The solvent was shipped to Department of Defense depots in Norfolk, Virginia;

Oakland, California; Mechanicsburg, Pennsylvania; Columbus, Ohio; Memphis, Tennessee; Richmond, Virginia; and Ogden, Utah. No shipments were made by respondent to Georgia, but as testified by a contracting officer for the Department of Defense, "While the supplying contractors do not know the ultimate destination of any solvent once it gets to a depot, from my experience all contractors know that the material is subject to being shipped to Army, Navy and Air Force bases all over the United States and its possessions. . .", and to National Guard Armories. (Ronald L. Perkinson affidavit). Respondent's president also indicated knowledge that the solvent was distributed by the depots to other areas. Respondent was the only manufacturer of the solvent for the Government during 1982, and one of only two during 1981.

The district court sustained respondent's motion to dismiss for lack of *in personam* jurisdiction (Appendix 1), but did not pass upon the governmental contractor immunity defense.[2]

The Court of Appeals affirmed *per curiam* "on the basis of the district court's dispositive opinion . . ." (Appendix 2)

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of *in personam* jurisdiction contrary to the way in which the Courts of Appeal for the First, Fifth and Seventh Circuits have decided it.

---

2. Petitioner relied upon the exception recognized by this Court in *Boyle*, i.e., where the "supplier (failed to warn) the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States" (487 U.S. at 512).

Under Rule 10 of the Rules of this Court, that is a reason supporting the grant of certiorari.

This Court's decision in Asahi Metal Industry Co. Ltd. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and to a lesser extent, World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), have created confusion as to the status of the "stream of commerce" doctrine of in personam jurisdiction in products liability cases as applied to manufacturers, first definitively articulated in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).[3] "Since Gray v. American

---

3. "As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those

Radiator & Standard Sanitary Corp., American courts have readily asserted jurisdiction over nonresident manufacturers and distributors whose injury-causing products have reached the

---

products. Advanced means of distribution and other commercial activity have made possible these modern methods of doing business, and have largely effaced the economic significance of State lines. By the same token today's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other States.

Unless they are applied in recognition of the changes brought about by technological and economic progress, jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in the light of the facts of economic life as it is lived today. Otherwise the need for adaptation may become so great that basic rights are sacrificed in the name of reform, and the principles themselves become impaired." (176 N.E. 2d at 766).

forum as a result of their purposeful introduction into the 'stream of commerce'. This stream of commerce concept supports the forum's exercise of jurisdiction - although the product's presence there is the immediate result of the independent actions and objectives of intermediaries in the distribution chain." Murphy, Personal Jurisdiction And The Stream Of Commerce Theory: A Reappraisal And A Revised Approach." 77 Ky. L.J. 248 (1988-89).

The Court expressly approved the doctrine in World-Wide Volkswagon, supra.[4] Nevertheless, the Court's

---

4. "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Compare Gray v American Radiator & Standard Sanitary Corp., 22 Ill 2d 432, 176 NE2d 761 (1961)." (444 U.S. at 297-298). The dissenting opinions of Justices Brennan,

holding in that case (to the effect that jurisdiction could not be asserted in an Oklahoma Court against a New York Audi dealer who had sold a vehicle to a New York resident who drove the car into Oklahoma and had a wreck, nor against the New York-based regional distributor) did raise uncertainty about the scope of long-arm jurisdiction, and Asahi, supra, decided in 1987, raised doubts at least in

---

f.n. 4 continued . . . Blackmun and Marshall obviously agreed with this proposition. Nevertheless, although World-Wide involved the different factual situation of a local car dealer and a regional distributor and not a manufacturer, some language of the Court concerning the "fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma" (444 U.S. at 295), and the discussion of forseeability and a defendant's "purposefully availing itself of the privilege of conducting activities within the forum state . . ." (444 U.S. at 295-297), generated some doubt as to jurisdiction.

the minds of commentators as to the continued viability of the stream of commerce theory.[5]

World-Wide Volkswagon, as the Court of Appeals for the Seventh Circuit recognized in Nelson v. Park Industries, Inc., 717 F2d 1120, 1125-26 (7th Cir. 1983), cert. den. 465 U.S. 1024 (1984), turned upon the fact that the suit there was against a retail dealer and regional

---

5. Murphy, supra; Maltz, "Unraveling The Conundrum of the Law of Personal Jurisdiction: A Comment On Asahi Metal Industry Co. v. Superior Court of California", 1987 Duke L.J. 669, 671 (1987); Van der Creek, "Jurisdiction Over The Person - The Progeny of Pennoyer And The Future of Asahi", 13 Nova L.R. 1287, 1309 (1989); Note, "Personal Jurisdiction: The Evolution of the Minimum Contacts Analysis", 20 U. West. L.A. L.R. 219, 248 (1988-89); Note, "Personal Jurisdiction After Asahi: The Other International Shoe Drops", 55 Tenn. L.R. 41, 92 (1987); Note, "Jurisdiction, Fair Play and Foreign Defendants: Asahi Metal Industry Co. v. Superior Court", 61 St. John L.R. 629, 630 (1987) (Observing that the stream of commerce theory had been recognized by a majority of the Circuits).

distributor, and not the manufacturer or a national distributor. See Bean Dredging Corp. v. Dredge Technology Corp., 744 F2d 1081 (5th Cir. 1984).

Respondent argued below, and the District Court so held (which was adopted by the Court of Appeals) Opinion, p. 9 (Appendix 1) that the Court in Asahi expressly disapproved of the stream of commerce basis of jurisdiction as applied to a manufacturer. That clearly is not correct. Asahi was decided instead on the second of the two prongs of the International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed 95 (1945) jurisdictional test relating not to the sufficiency of minimum contacts, but to the proposition that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice" (326 U.S. at 316).

Justice O'Connor's opinion for herself and three other members of the Court did arguably reject stream of commerce in its pristine form, although seeming to recognize a modified version of the principle.[6] The factual situation in

---

6. "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." (480 U.S. at 112). The present case, it is submitted, satisfies this modified standard, for here defendant availed itself of the nation-wide and world-wide distribution system of the Department of Defense, by manufacturing the solvent solely for Defense Logistics Agency, and shipping it to 7 depots

Asahi dictated the result in that case, in that there, the damage suit by the forum based motorcycle driver injured from a tire blow-out had been settled, and the only dispute remaining was a question of contribution between two defendants, a Taiwanese manufacturer of the tube and the Japanese manufacturer of the valve assembly used in the tube, neither of which had any connection with the forum, California. An additional factor in Asahi was the presence of international commerce and the implication for foreign relations. 480 U.S. at 114-116; Maltz, supra, 1987 Duke L.J. at 679; The Supreme Court, 1986 Term, 101 Harv. L.R. 260, 265

---

f.n. 6 continued. . . located in 6 widely separated states, knowing that it would in turn be shipped all over the nation and the world.

(1987); Murphy, supra, 77 Ky. L.R. at 274 (1988-89); A.I.M. International, Inc. v. Battenfeld Extrusion Systems, Inc., 116 F.R.D. 633, 641 (D.C. Ga. 1987).

In Morris v. SSE, Inc., 843 F2d 489 (11th Cir. 1988), the Eleventh Circuit observed that the status of the "stream of commerce" doctrine was uncertain after Asahi, but proceeded to hold in that case that jurisdiction was satisfied under either theory espoused in Asahi. Now, however, the Court of Appeals has, by adopting the district court decision, flatly held that stream of commerce as applied to a manufacturer has been discredited by Asahi. It is submitted that such is not the case. Justice Brennan with three other justices in Asahi expressly asserted the continued vitality of the principle, and Justice Stevens' special concurrence seems to

lean toward the Brennan opinion on this point by (1) rejecting the linch-pin of Justice O'Connor's rationalization, i.e., the "purposefully availing" requirement and (2) in his insistence that there is not necessarily any distinction between "purposefully availing" and "mere awareness" (480 U.S. at 122).[7]

---

7. The "purposeful availment" twist to in personam jurisdiction under minimum contacts was added by Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958), but Justice Brennan's opinion for the Court in Burger King Corp. v Rudewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), makes clear that the elements of "stream of commerce" also satisfy the purposeful availment gloss. See 471 U.S. at 472-473, where after referring to a defendant purposefully directing his activities toward the forum, Justice Brennan declares: "Thus '[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State" and those products subsequently injure forum consumers. World-Wide Volkswagon Corp. v. Woodson,

It is respectfully submitted that the Courts below erred in refusing to follow the stream of commerce doctrine under the facts here, which as stated previously, satisfied even the modified O'Connor version. On the other hand, three other Circuits, the First, Fifth and Seventh Circuits, have held that "stream of commerce" survives Asahi. As to the Fifth Circuit, see Irving v. Owens-Corning Fiberglas Corp., 864 F2d 383 (5th Cir. 1989); Gulf Consolidated Services v. Corinth Pipeworkers, S.A., 898 F2d 1071 (5th Cir. 1990). The Seventh and First Circuits also have either upheld or applied the stream of commerce theory of jurisdiction after Asahi. Mason v. F. Lli Luigi & Franco

---

f,n. 7 continued . . . supra. . ." See also, Justice White's opinion in World-wide, which says that stream of commerce satisfies the purposefully availing requirement. (444 U.S. at 297).

Dal Maschio, 832 F2d 383 (7th Cir. 1987) (citing Gray, and Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F2d 26 (1st Cir. 1988) (Approves theory, but direct marketing by defendant also was involved). The stream of commerce doctrine was well-settled prior to Asahi. Gray v. American Radiator and Standard Co., supra; In re Agent Orange Litigation, 818 F2d 145 (2nd Cir. 1987); Omstead v. Brader Heaters, Inc., 5 Wash. App. 258, 487 P2d 234, 240 (1971), aff'd 80 Wash 2d 720, 497 P2d 1310, 1972); Oswalt v. Scripto, 616 F2d 191 (5th Cir. 1980) (Japanese manufacture of cigarette lighters subject to suit in U.S.); Sells v. International Harvester Co., 513 F2d 762 (5th Cir. 1975); reh. den. 522 F2d 1280; Bean Dredging Corp. v. Dredge Technology Corp.; 744 F2d 1081 (5th Cir. 1984); DeJames v. Magnificience Carriers, Inc., 654 F2d 280 (3rd Cir. 1981), cert.

den. 454 U.S. 1085 (1981); Pfiffer v. International Academy, 521 F. Supp. 1331 (D.C. Mo. 1981); Tedford v. Grumman American Aviation Corp., 488 F. Supp. 144 (D.C. Miss. 1980); Stoehr v. American Honda Motor Co., 429 F. Supp. 763 (D.C. Neb. 1977); Haley v. Wright Mfg. Co., 651 F. Supp. 116 (D.C. La. 1986); McDaniel v. Armstrong World Industries, 603 F. Supp. 1337 (D.C. D.C. 1985); McDaniel v. Johns-Manville Sales Corp., 487 F. Supp. 714 (D.C. Ill. 1978) (Canadian seller of asbestos held subject to suit by placing asbestos in stream of commerce); Hall v. Zambelli, 669 F. Supp. 753 (D.C. W. Va. 1987) (where manufacturer sells to a distributor knowing that the product is to be distributed throughout the United States, due process is satisfied); Scott v. Crescent Tool Co., 296 F. Supp. 147 (D.C. Ga. 1968); Payne v. Kristofferson,

631 F. Supp. 39 (D.C. Ga. 1985); Rowe v. Dorrough, 150 Cal. App. 3rd 901, 198 Cal. Rptr. 131 (1984); Irving v. Owens-Corning Fiberglas Co., 864 F2d 383 (5th Cir. 1989); Value Engineering Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29 (1976); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305 (D.C. Ga. 1980); Thornton v. Toyota Motor Sales U.S.A., Inc., 397 F. Supp. 476 (D.C. Ga. 1975); Burton v. Subaru of America, Inc., 646 F. Supp. 78 (D.C. Ga. 1986); 63 Am. Jur. 2d 1286, §893; 4 Wright & Miller, Federal Practice and Procedure, §1069, at pp. 391-392.

The Court below erred in holding that the doctrine has been abrogated by Ashai.

The District Court below also erred in undertaking to construe the Georgia long-arm jurisdiction statute because, having recognized that it had been

construed by the Georgia Courts as extending jurisdiction over nonresidents to the maximum extent allowed by due process, it is not necessary to consider or apply state law. Morris v. SSE, Inc., 843 F2d 489, n. 3 (11th Cir. 1988); Interfirst Bank Clifton v. Fernandez, 844 F2d 279, 282 (5th Cir. 1988); Irving v. Owens-Corning Fiberglas Corp., 864 F2d 383, 385 (5th Cir. 1989); Bean Dredging Corp. v. Dredge Technology Corp., 744 F2d 1081, 1083 (5th Cir. 1984); American Greetings Corp. v. Cohn, 839 F2d 1164, 1167 (6th Cir. 1988); Sinatra v. National Enquirer, Inc., 854 F2d 1191 (9th Cir. 1988).

THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE COURT BELOW SHOULD HAVE TRANSFERRED UNDER 28 USC 1406(a) RATHER THAN DISMISSING

In Goldlawr v. Heiman, 369 U.S. 463, 82 S. Ct. 913, 8 L.Ed.2d 39 (1962), this Court held that transfer to an appropriate venue rather than dismissal was proper

under 28 USC 1406(a), in a case where both venue and jurisdiction were lacking, even where there was no motion to transfer. In this case, venue was proper as far as the statute was concerned, but the District Court and Court of Appeals held that jurisdiction was lacking. Here, as in Goldlawr, plaintiffs did not move for a transfer in the District Court, and reasonably could not do so without waiving their contention that jurisdiction existed under the stream of commerce theory, but they did enumerate error in the Court of Appeals on the ground that the District Court should have done so sua sponte independently of a motion. The Court of Appeals rejected this enumeration of error. In Goldlawr, the Court held that transfer rather than dismissal was proper because "The problem which gave rise to the enactment of the section was that of avoiding the

injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be 'found' or that they 'transact . . . business' in the Eastern Disrict of Pennsylvania. The language and history of §1406(a), both as originally enacted and as amended in 1949, show a congressional purpose to provide as effective a remedy as possible to avoid

precisely this sort of injustice." (369 U.S. at 466).

The same principle is applicable here. Because a civilian physician originally diagnosed petitioner Oliver Bond's condition as being unrelated to the chemical exposure, it was not until amost four years later that he learned otherwise. This presented no problem under the Georgia Statute of Limitations in products liability cases which is to the effect that the statute starts to run when the plaintiff discovers the facts of the case indicating that he has a cause of action. Andel v. Getz Services, 197 Ga. App. 653, 399 SE2d 226 (1990). Georgia also has a rule that where a plaintiff suffers dismissal that is not on the merits, he may refile within six months thereafter regardless of whether the statute of limitations has run in the interim.

O.C.G.A. §9-2-61. Georgia law also is to the effect that when an action is brought in the wrong venue, whether because of jurisdiction or otherwise, the Court should not dismiss, but should transfer to the proper court. Constitution of Georgia, 1983, Art. VI, Sec. I, Par. VIII. All of these questions are uncertain under New Jersey law, and it is doubtful that petitioners could refile in New Jersey.

The Court of Appeals' per curiam affirmance left these questions unconsidered, but respondent's argument below was that §1406(a) applies only where venue is improper, but not where in personam jurisdiction was lacking. This distinction is not a valid one, as observed in Wright & Miller (Vol. 15, §382), p. 171), and as more particularly recognized in the decision of the Fifth

Circuit in Dubin v. U.S., 380 F2d 813 (5th Cir. 1967), and in other cases, such as Porter v. Groat, 840 F2d 255, 258 (4th Cir. 1988); Ross v. Colorado Outward Bound School, Inc., 603 F. Supp. 306 (D.C. N.Y. 1985); Tillary v. Idaho Power Co., 425 F. Supp. 376 (D.C. Wash. 1976); Westphal v. Mace, 660 F. Supp. 10 (D.C. Ariz. 1987); Ladwig v. Trust Ins. Exchange, 498 F. Supp. 161 (D.C. Wis. 1980); Mayo Clinic v. Kaiser, 383 F2d 653, 655 (8th Cir. 1967); Hapaniewski v. City of Chicago Heights, 883 F2d 576 (7th Cir. 1989); Corke v. Sameit M.S. Song of Norway, 572 F2d 77 (2nd Cir. 1978); and Bentz v. Recile, 778 F2d 1026 (5th Cir. 1985).

As Judge Johnson pointed out for the Court in Dubin, the statute itself does not refer to venue, but instead, uses the terms "district" or "division".

In Goldlawr v. Heiman, supra both venue and jurisdiction were lacking, and clearly, if transfer is proper when both are lacking, transfer is equally proper when only one is lacking.

A Court of Appeals is authorized and empowered to transfer cases under §1406(a). Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 343 F2d 905 (8th Cir. 1965); Becker v. Commission of Internal Revenue, 852 F2d 524 (11th Cir. 1988). Here, the Court of Appeals did not order transfer, so it presumably adopted respondent's argument that transfer was not proper because the Georgia District Court lacked jurisdiction and not just venue. This is contrary to the law in at least 5 other circuits. This Court should hold that (1) Transfer under §1406 is proper when jurisdiction or venue are lacking; (2) That the District Court itself should

transfer without requiring the plaintiff to waive his objections to the holding of no jurisdiction; and (3) The Court of Appeals on appeal should order transfer when the District Court fails to do so. Only in this way can the mass of confusion evidenced in some district court decisions be resolved.

CONCLUSION

The writ should be granted.

Respectfully Submitted,

HEARD, LEVERETT & PHELPS, P.C.

BY: E. Freeman Leverett

E. Freeman Leverett
State Bar No. 448000
Counsel of Record for Petitioners

P. O. Drawer 399
Elberton, Georgia 30635
Tel: 404/283-2651
FAX: 404/283-2670

APPENDIX

I

PER CURIAM OPINION OF THE COURT OF APPEALS

OLIVER M. BOND and HERTA R. BOND,
Plaintiffs-Appellants,

v.

OCTAGON PROCESS, INC.,
Defendant-Appellee.

No. 90-8898.

United States Court of Appeals,
Eleventh Circuit.

March 28, 1991.

Appeal from the United States District Court for the Middle District of Georgia, Duross Fitzpatrick, District Judge.

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The judgment of the district court is affirmed on the basis of the district court's dispositive opinion, which is reported as Bond v. Octagon Process, Inc., 745 F. Supp. 710 (M.D. Ga. 1990).

AFFIRMED.

II

PER CURIAM OPINION OF
THE COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

OLIVER M. BOND and HERTA R. BOND,

Plaintiffs,

vs.

OCTAGON PROCESS, INC.,

Defendant.

CIV. NO. 87-41-ATH(DF)

Filed at 4:40 P.M., September 19, 1990
Donna N. Phillips, Deputy Clerk,
U.S. District Court
Middle District of Georgia

FITZPATRICK, District Judge

This products liability case is before the court for resolution of the defendant's motion to dismiss for lack of personal jurisdiction and, alternatively, for summary judgment based on the plaintiff's failure to state a claim.

I. FACTS

On December 5, 1982, plaintiff Oliver Bond was engaged in active service with the National Guard at the Elberton, Georgia, Armory and was washing an M578 recovery vehicle with a cleaning solvent, MIL-C-11090D, NSN 6850-00-224-6665, manufactured by the defendant. The day was a very cold one and the plaintiff applied the solvent using a brush and bucket without protective gloves and without having read the warning label on the solvent cans. After a short while, his hands started burning, but he continued to wash the vehicles for several hours. The pain in his hands continued through the next day.

After the pain lasted for some time, plaintiff went to see a civilian doctor who diagnosed his problem as Buerger's disease, which is related to smoking.

Another doctor, however, diagnosed the plaintiff's condition as Raynaud's phenomenon, the freezing of flesh in such a manner as to damage permanently blood vessels and cut off circulation. In 1986, doctors at Eisenhower Medical Center at Fort Gordon, Georgia, identified the plaintiff's problem as acquired acrosteolysis caused by exposure to chemical solvents and a cold environment. Later, this diagnosis was changed to Raynaud's phenomenon caused by cold environment and the defatting and evaporative effects of chemical solvents, rather than any toxic effects of the solvent in question itself. In other words, the plaintiff claims his injuries are due to the combination of cold weather and the effect of solvents in such weather of removing the oils on the skin and making it more vulnerable to the

cold. Additionally, he claims that the solvent further cools the skin through evaporative cooling, which occurs when body heat is lost in warming the solvent on the skin and converting it from a liquid to a gaseous state. In cold weather, these properties of the solvent mean that any flesh coming into contact with it will cool more quickly than otherwise and be susceptible to freezing. Since the incident, plaintiff has suffered great pain and is in the process of losing his fingers and possibly his hands as the skin tissue slowly dies.

Plaintiff filed his complaint on May 7, 1987, seeking damages for personal injuries, including pain and suffering, permanent and total disability, loss of wages, loss of ability to labor, loss of fingers and for hospital and medical expenses. His wife, Herta Bond, also

sued for loss of consortium, including services, society, companionship and affection. Plaintiffs allege that Mr. Bond's injuries were caused by the defendant's failure to provide adequate warnings of the dangers of exposure to solvents at low temperatures.

Octagon Process, the defendant, is a New Jersey corporation with no offices, employees, agents or other personal contacts with Georgia. Octagon has no agent for service of process in Georgia and has never sought approval from the state of Georgia to do business there.

At its plant in New Jersey, the defendant manufactures the solvent in question pursuant to a government contract. The solvent is made according to specifications issued by the government; Octagon did not develop or alter the formula supplied by the

government. A government inspector stationed at the defendant's plant supervised the manufacturing process and had the authority to set aside any shipment that failed to conform to the specifications before it left the premises. The solvent was made for sale to the United States only and has never been sold to any private purchaser. At the time of the injury, Octagon was the only approved supplier of the solvent.

On June 14, 1989, Octagon filed its motion for dismissal and summary judgment based on three theories: (1) that there is no personal jurisdiction based on the Georgia long-arm statute; (2) that even if the statute gives this court jurisdiction the defendant will be put to unreasonable hardship if it must defend in Georgia; and (3) that the government contractor defense applies and shields

the defendant from liability. After reviewing the applicable law and facts, the court is ready to issue its ruling.

II. PERSONAL JURISDICTION

In a federal diversity suit, there is a two-step process used in determining whether a state jurisdictional statute confers jurisdiction over a non-resident defendant. First, it must be decided whether the defendant is amenable to suit under the state statute, as determined by the law of the state. Next, if the first step is met, the court must decide whether the assertion of jurisdiction over the defendant meets federal due process requirements. Delong Equipment Co. v. Washington Mills Abrasive Co., 840 F.2d 843 (11th Cir. 1988); Oswalt v. Scripto, Inc., 616 F.2d 191, 195-96 (5th Cir. 1980).

The plaintiff seeks to bring the defendant within the reach of the Georgia long-arm statute, O.C.G.A. § 9-10-91, which reads in pertinent part:

> A court of this state may exercise personal jurisdiction over any non-resident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he: . . .
>
> > (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; . . .

Plaintiffs must show that the defendant is amenable to suit under this statute before any federal constitutional questions are reached. It has been determined by Georgia courts that the Georgia long-arm statute allows for

jurisdiction to be exercised over defendants to the maximum extent allowed by due process. Value Engineering Co. v. Gisell, 140 Ga. App. 44, 230 S.E.2d 29 (1976); Hollingswroth v. Cunard Line, 152 Ga. App. 509, 263 S.E. 2d 190 (1979). In order to comply with this section of the long-arm statute, the following test must be satisfied:

> (1) The nonresident has purposefully done some act or consummated some transaction with or in the forum (but the actual act or omission resulting in the injury here need not have occurred in this state.) The defendant need not be physically within the forum when this act or transaction occurs and a single such instance may suffice;
>
> (2) The Georgia plaintiff must have a legal cause of action in tort against the nonresident, which arises out of, or results from, the purposeful activity of the defendant involving this state; a resident is the victim of a "tortious act" when he suffers an injury here due to an act or omission of negligence occurring outside this state; and

(3) If the requirements of (1) and (2) are satisfied, the exercise of jurisdiction over the nonresident must be "reasonable."

Shellenberger v. Tanner, 138 Ga. App. 399, 404-05, 227 S.E.2d 266, 273 (1976); cited with approval in Smith v. Smith, 254 Ga. 450, 330 S.E.2d 706, 706 (1985); Delong, 840 F.2d at 849.

The court is not satisfied that the first part of the Shellenberger test has been met in this cse. It is undisputed that Octagon has no direct ties with Georgia, as noted above. The deposition of Mr. Lee Leibmann, Octagon's president, indicates that the defendant shipped the solvent in question to various government depots around the country, after which the government sent it to where it was needed. (Depo. pp. 22-24). Thus, the defendant shipped the product to an independent distributor who then controlled where it ws ultimately sent.

This is the closest contact Octagon has ever had with Georgia, and it simply does not qualify as "a transaction with or in the forum." Shellenberger, 227 S.E.2d at 273. If, for example, Octagon had directly sent the solvent to the National Guard armory in Elberton or consummated a bargain to sell the solvent directly to the Georgia National Guard this would of course satisfy the test, but such is not the case here, and the defendant is thus not amenable to suit under the Georgia long-arm statute.

Even if all three of the Shellenberger requirements had been fulfilled, Octagon would still not be subject to the jurisdiction of this court because federal constitutional due process requirements are not satisfied. The Supreme Court has laid down and developed guiding principles of due process in a

series of cases over the past several decades.[1] In International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), the Court stated the basic two-part test for determining when states may exercise jurisdiction over non-resident defendants: (1) they must have "minimum contacts" with the forum state and (2) the maintenance of the suit must not offend "traditional notions of fair play and substantial justice." 326

---

1. There are two types of personal jurisdiction: general and specific. General personal jurisdiction arises from a party's contacts with the forum state that are unrelated to the litigation; the test is whether the party had "continuous and systematic" general business contacts with the forum state. Specific personal jurisdiction is based on a party's contacts with the forum state that are related to the litigation. Delong, 840 P.2d at 853 (citations omitted). The plaintiff in the case at bar has not alleged that general jurisdiction exists over the defendant and could not do so given the facts. the discussion in the text therefore concerns specific jurisdiction.

U.S. at 316, 66 S.Ct. at 158. (The second part of this test has been rephrased to mean that it must be "reasonable" for a court to exercise jurisdiction over a defendant. Delong, 840 F.2d 854.) This standard was later clarified to mean that due process requires some purposeful availment by the defendant of the privilege of conducting activities in the forum state and thus invoking the benefits and protections of that state's laws. Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958).

A limit on expanding notions of due process was provided in World-Wide Volkswagon v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), in which the Court rejected the notion that the defendant was amenable to suit simply because of the "foreseeability" that the

item it sold might enter the forum state. Instead, the Court decided that due process was based on whether the defendant's conduct and connection with the forum state were such that it could reasonably anticipate being haled into court there. 444 U.S. at 297, 100 S.Ct. at 567. In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), the Court stated that jurisdiction over a non-resident defendant was proper if the defendant had delivered its products into the stream of commerce with the expectation that they would be purchased by consumers in the forum state and those products subsequently injured forum consumers. 471 U.S. at 473, 105 S.Ct. at 2182.

The Supreme Court greatly narrowed the application of the stream of commerce theory in Asahi Metal Ind. v. Superior

Court of California, Solano County, ____ U.S.____, 107 S.Ct. 1026, 1033 (1987). Asahi was a Japanese valve assembly manufacturer who sold its products to a Taiwanese tire manufacturer who exported the completed tires to the United States. After a products liability suit was filed because of an accident allegedly caused by a defective tire, the Taiwanese defendant filed a cross-claim for indemnification which became the subject of the case that reached the Supreme Court after the underlying action had been settled and dismissed. The California Supreme Court had earlier determined that due process would allow for the exercise of jurisdiction over Asahi in California, since the defendant had intentionally placed its products in the stream of commerce and knew that some

of the completed tires containing its products would be sold in California.

In analyzing whether Asahi had form (sic) sufficient minimum contacts with California to justify that state's exercise of jurisdiction, a plurality of the Court noted that since its decision in World-Wide Volkswagon, 444 U.S. 286, 100 S.Ct. 559, two versions of the stream of commerce theory had arisen. Some courts had read the due process clause as allowing for jurisdiction based on nothing more than the defendant's placing the product in the stream of commerce, while others had required some action of the defendant more purposefully directed at the forum state than mere awareness that its product would eventually reach there. The California Supreme Court had adhered to the former view of due process. Asahi, 107 S.Ct. at 1032.

The Supreme Court, however, decided that this was not sufficient and that for the due process clause to be satisfied there had to be some act of the defendant purposefully directed toward the forum state. Merely placing an item in the stream of commerce, without more, was held not to be enough. Furthermore, the Court stated that even the defendant's awareness that its product would eventually reach the forum state via the stream of commerce did not convert the act of placing the product into the stream into an act purposefully directed toward the forum state. 107 S.Ct. 1033.

Keeping these standards in mind, it is clear to this court that it cannot exercise personal jurisdiction over Octagon. Even assuming that the plaintiffs are correct when they claim that Octagon knew its product would

eventually enter Georgia (Brief on Behalf of Plaintiffs in Opposition to Defendant's Motions to Dismiss, for Failure to State a Claim, and for Summary Judgement, pp. 8-9), Asahi has made it clear that this is simply not enough to form sufficient minimum contacts so that Octagon could foresee being haled into court here. The record reveals no other act by the defendant purposefully directed toward Georgia as required by Asahi. When Octagon sold the solvent to the Department of Defense, which acted as an independent distributor, it merely placed its product into the stream of commerce, an act which alone will not allow this court to exercise personal jurisdiction in Georgia.[2]

---

2. The court is aware that this reading of Asahi will allow defendants to organize their operations to avoid selected jurisdictions and their laws. Cound, Friedenthal, Miller & Sexton,

Plaintiffs make a valiant, but unsuccessful, effort to distinguish Asahi. They correctly point out that Asahi dealt with a cross-claim for indemnification after the original suit involving the injured party had been settled. While valid, this distinction is insufficient to overcome the general jurisdictional rules laid down in the case. To adopt plaintiff's interpretation would limit Asahi to cases with facts practically identical to it, something which this court declines to do. Also, plaintiffs claim that one of the main reasons the Supreme Court found that there was no jurisdiction over Asahi in California was because the case involved two foreign parties and to have

---

f.n. 2 continued . . . Civil Procedure 137 (5th ed. 1989). Nonetheless, the Supreme Court's ruling compels this result.

exercised jurisdiction over the defendant would have subjected it to the unique burdens of defending in a foreign legal system. This is also true, but this reason concerns the second part of the International Shoe test (whether exercising jurisdiction over the defendant is reasonable), and has nothing to do with the first part (whether the defendant has sufficient minimum contacts with the forum). While it may be reasonable to exercise jurisdiction over Octagon in this case, the court still cannot do so if the defendant lacks sufficient minimum contacts with the forum, which, as discussed above, is true of Octagon.

In addition, the plaintiffs attempt to distinguish World-Wide Volkswagen, which itself placed some limits on due process jurisdiction, by noting that the

defendant in that case, over whom the Supreme Court decided that jurisdiction could not be exercised, was merely a distributor of the product and not a manufacturer. Plaintiffs give great weight to the fact that Justice Blackmun himself pointed out this distinction, 444 U.S. at 317-318, 100 S.Ct. at 570 (Blackmun, J., dissenting), and claim that since this suit is against a manufacturer the court should exercise its jurisdiction. The court notes, however, that the defendant in Asahi, over whom the Supreme Court held there was no jurisdiction in part because of insufficient minimum contacts, was also a manufacturer, and thus the plaintiffs' distinction has little influence. As Asahi makes clear, the essential question is whether the defendant, regardless of his status as a manufacturer or

distributor, has done some act purposefully directed toward the forum state so as to form sufficient minimum contacts with that state such that he could anticipate being haled into court there. Regarding Octagon, this requirement simply has not been fulfilled.

Plaintiffs also place great reliance on Oswalt, 616 F.2d 191, and some similar cases.[3] In Oswalt, the plaintiff was injured when a cigarette lighter malfunctioned. The lighter had been manufactured in Japan but distributed in the United States by Scripto, Inc., an

---

3. The plaintiffs also cite Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984), and Petroleum Helicopters, Inc. v. Avco Corp., 804 F.2d 1367 (5th Cir. 1986). In both cases the Fifth Circuit held that the defendants were subject to personal jurisdiction because they had placed their products in the stream of commerce with the expectation or knowledge that the goods would reach the forum state.

American Corporation. There was no evidence that the Japanese manufacturer had any officers or agents in the United States or any contacts with the United States at all except for the distributing agreement with Scripto. Nonetheless, the court found that there was personal jurisdiction over the manufacturer because it knew that its lighters were being sold nationally in the United States and thus had reason to know that its products would reach the scene of the injury. By utilizing the distribution network established by Scripto, the Japanese company had established sufficient minimum contacts so that it could reasonably expect to be haled into court in this country. 616 F.2d at 198-200.

Plaintiffs' reliance on Oswalt and cases with similar holdings is misplaced,

however, because of changes in the law. Oswalt was decided in 1980 immediately after the Supreme Court's decision in World-Wide Volkswagen and adhered to the view that merely placing a product in the stream of commerce without more was enough to satisfy due process requirements. As noted above, the Supreme Court rejected this line of thinking in Asahi by holding that due process also requires some purposeful act by the defendant directed toward the forum state. Oswalt and cases like it simply do not speak to the case at bar.

III. CONCLUSION

After careful consideration of the facts and law in this case, the court has decided that Octagon's motion to dismiss for lack of personal jurisdiction due to insufficient minimum contacts between it

and the forum state should be GRANTED. Accordingly, the court need not reach the questions of whether it would be reasonable to exercise jurisdiction over the defendant in Georgia or the government contractor defense. The plaintiffs' case is hereby ordered DISMISSED.

SO ORDERED, this 19 day of September, 1990.

/s/ DUROSS FITZPATRICK
DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

PUBLISHER'S NOTE

THE FOLLOWING PAGES ARE UNAVAILABLE FOR FILMING:

A-27 & A-28

CERTIFICATE OF SERVICE

I hereby certify that I have served copy of the foregoing Petition for Writ of Certiorari upon Mr. Carl R. Woodward, Carella, Byrne, Bain, Gilfillan, Cecchi and Stewart, 6 Becker Farm Road, Roseland, New Jersey 07068-1739 and upon Mr. Peter J. Anderson, Peterson, Young, Self & Asselin, Suite 1100, 230 Peachtree Street, N.W., Atlanta, Georgia 30303, Attorneys for Respondent, by mail, duly addressed and postage prepaid.

This 30th day of April, 1991.

E. Freeman Leverett

Attorney for Petitioners